REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. E094 OF 2021

REVIVAL HOLDINGS LIMITED..... APPLICANT

VERSUS

GRANDE AFRIQUE CONSULTING.....RESPONDENT

RULING

Introduction

The suit herein was filed by the applicant through its notice of motion dated 5th March 2021 seeking the following orders:-

1. That this application be certified as urgent and the same be heard ex-parte in the first instance and service of the same be dispensed with.

2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a TEMPORARY INJUNCTION restraining the Respondent or anyone acting on its behalf from either directly or indirectly, manufacturing, developing, distributing, promoting, marketing, selling or licencing any software which is substantially similar to the Applicant's software or is reasonably considered by the Applicant to be a competitive software.

3. THAT pending the conclusion of any arbitration proceedings between the parties herein, this Honourable Court be pleased to issue a TEMPORARY INJUNCTION restraining the Respondent or anyone acting on its behalf from either directly or indirectly, manufacturing, developing, distributing, promoting, marketing, selling or licencing any software which is substantially similar to the Applicant's software or is reasonably considered by the Applicant to be a competitive software.

4. THAT pending the hearing and determination of this Application, the court be pleased to issue a TEMPORARY INJUCTION restraining the Respondent from soliciting the Applicant's clients or collecting and receiving any payments from the Applicant's clients in line with provision of software services.

5. THAT pending the conclusion of any arbitration proceedings between the parties, the court be pleased to issue a TEMPORARY INJUCTION restraining the Respondent from soliciting the Applicant's clients or collecting and receiving any payments from the Applicant's clients in line with provision of software services.

6. THAT the costs of this Application be borne by the Respondent.

Preliminary Objection

The respondent's however filed a preliminary Objection dated 13/4/2021 on the ground that;

a. Section 7 of the Arbitration Act No. 4 of 1995 as read with Rule 2 of the Arbitration Rules 1997 require in mandatory terms that an application for interim measures should be anchored in a suit.

b. The application for interim reliefs made vide a Notice of Motion and not vide Chamber Summons as envisaged under Rule 2 of the Arbitration Rules 1997.

c. The appropriate forum that should entertain the matter including the preliminary Objection herein is the High Court, Commercial and Tax Division and not this honorable court.

d. That the applicant's application dated 5/3/2021 is scandalous, frivolous, vexatious and amounts to an abuse of court

process because by the time the application dated 5/3/2021 was filed in court there was no arbitration proceedings upon which to predicate interim reliefs sought in the said application and the governing law of the seller agreement is the laws of Mauritius.

e. **The applicants application is incurably bad and defective and should be struck out in limine with costs to the respondent**

It is the respondent's submission that the application herein is brought under a Notice of Motion seeking interim reliefs pending arbitration and is therefore incurably defective given that it is not anchored in a suit. That the grant of the interim reliefs sought are guided by **Section 7 of the Arbitration Act** which provides

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

In terms of procedure **Rule 2 of the Arbitration Rules 1997**, require in mandatory terms that;

"Applications under Section 6 and 7 of the Act shall be made by summons in the suit"

The respondents argued that the court's power of intervention is limited only to the cases where the applicant complies with Section 7 of the Arbitration Act as read with rule 2 of the Arbitration Rules and from the Act and rules it is clear that the application of interim reliefs must be made in an existing suit. Secondly, the application must be made by chamber summons and the application herein does not meet these two mandatory requirements. In support reference was made to the case of **Scope Telematics International Sales Limited v Stoic Company Limited & Another [2017] eKLR** where it was held

"**The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective."**

The respondent counsel further submitted that the court lacks jurisdiction to hear and determine the application herein. It was argued that the applicant based its application on the terms of the reseller agreement. However, clause 33 of the agreement provides that the governing law of the agreement shall be exclusively the law of Mauritius. Clause 25.4.1 of the reseller agreement provides that the seat of arbitration is in Mauritius and thus no basis to invoke the jurisdiction of this court considering Kenya is not the seat of the arbitration and the governing laws is not the laws of Kenya.

The respondent further submitted that at the time the application dated 5/3/2021 was filed in court there were no arbitration proceedings upon which to predicate the interim reliefs as sought and therefore the application was an abuse of court process

Finally, the respondents argued that the applicant's case is commercial in nature and this court being the Civil Division of the High Court lacks the jurisdiction to handle the dispute between the parties.

The applicant opposed the preliminary objection. In its submissions dated 12/7/2021 it is argued that the miscellaneous application filed herein is the proper pleading for tabling the issues between the two parties as the key issues for determination are not issues for determination before this court but rather subject to another legal process.

The applicants submitted that this court has proper jurisdiction to issue orders sought given that the breach complained of is taking place within the republic of Kenya and the respondent is a company incorporated within the said republic. That from the onset the applicant has not approached this court under any provision of the Arbitration Act but invokes the inherent power of the court as provided for under **Section 3A of the Civil Procedure Act** that provides;

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of court."

It was the applicant's argument that from the pleadings the Kenyan Arbitration Act and the rules do not apply in the current situation since the sought of arbitration agreed between the parties are Governed by the London Court of International Arbitration. That the respondent is committing a continuous breach of the Agreement between parties that warrants the intervention of this honorable court pending the hearing and determination of the dispute before the London Court of International Arbitration.

On whether there was an Arbitration proceeding by the time this application was filed the applicant claimed that the argument was misplaced as the essence of the injunctive reliefs sought is to prevent any further harm to the applicant pending the determination of the key issues by the proper forum.

Analysis and determination

A preliminary objection has been defined by the courts in a number of case. In the case of **Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd [1969] E.A.696** a Preliminary Objection was defined as:-

> **"a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"**

The respondents have raised a preliminary Objection where summarily they have argued that this court lacks jurisdiction to hear the present application. Among other grounds it is claimed that the applicant's application is on the terms of the reseller agreement whereby clause 33 provides that the governing law of the agreement shall exclusively be the law of Mauritius and further clause 25.4.1 provides that the seat of arbitration is in Mauritius and thus Kenyan courts have no jurisdiction over the suit herein.

In **Valentine Investment Company (MSA) Ltd vs Federal Republic of Germany [2006] e KLR**; the suit related to goods that were alleged to have been lost/destroyed by 2nd Defendant from Mombasa to Embakasi. An application was filed to have the suit stayed and be heard by German Courts. The High Court, Khaminwa J, relied on the following case on jurisdiction and stated as follows;

> **1. Kenya courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a strong reason for not doing so is shown. (emphasis added)**
>
> **2. The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.**
>
> **3. In exercising its discretion, the court should take into account all the circumstances of the particular case.**

In the Court of Appeal Madan J in **United India Insurance Co ltd vs East Africa Underwriters [1985] eKLR,** considered an exclusive jurisdiction clause and held:-

> **i. In what country the evidence on the issues of fact is situated, or more readily available, the effect of that on relative convenience and expense of trial as between the Court of the country and Court of Foreign country.**
>
> **ii. Whether, the law of the foreign court applies and if so whether it differs from law of country in any material respects**
>
> **iii. With what country either party is connected and how closely**
>
> **iv. Whether the Defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage.**
>
> **v. Whether the Plaintiffs would be prejudiced by having to sue in the foreign Court because they would be deprived of security of their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.**

The applicant has submitted that the respondent is a company incorporated within Kenya and that the orders that are being sought are in regards to a breach that is taking place within the country. In consideration of the fact that the said agreement in being performed in Kenya this court finds that it has jurisdiction to deal with the application. The matter can be handled by the Commercial and Tax Division or the Civil division. The bottom line is that these divisions are part of the Kenyan Courts.

Having determined so, this court turns back to the application at hand. The applicants herein have approached this court seeking an injunction pending the hearing and determination of an Arbitration.

The respondents have pointed out that, **Section 7 of the Arbitration Act** and **Rule 2 of the Arbitration Rules** make it mandatory that an application for interim reliefs must be made in an existing suit. The applicant approached the court by way of a miscellaneous application. There is no suit backing he application. The application dated 5th March, 2021 is seeking orders of injunction against the respondent pending the conclusion of any arbitration proceedings between the parties. The applicant ought to have filed a plaint seeking orders of injunction. Rule 2 of the Arbitration Act provides that applications under Section 6 and 7 of the Act shall be made by summons in the suit. Although the applicant did not make reference to the Arbitration Act in its application, it is evident that what is being sought is temporary relief pending arbitration. This is the basis of the application. The court cannot ignore the provisions of the Arbitration Act and rules on the simple ground that a party did not make reference to those provisions.

The said issue was discussed at length in **Scope Telematics International Sales Limited v Stoic Company Limited & another (supra)** where the High held that the fact that the application was not anchored on a suit did not render it fatal so as to deny the 1st respondent the right to seek interim relief. However, on appeal the Court of Appeal found that **Rule 2** is couched in mandatory terms and procedure should therefore be strictly followed. That the application should have been anchored on a suit and discretion cannot be used to override a mandatory statutory provision.

In consideration of the above, I agree with the finding of the Court of Appeal. The miscellaneous application is not the correct procedure. The preliminary objection is merited and is hereby granted. This suit is hereby struck out with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE